No. 15415

United States
Court of Appeals
for the Ninth Circuit

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-8-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

FALLON & HARGREAVES,
550 Montgomery Street,
San Francisco, California.

For Appellant.

LLOYD H. BURKE,
United States Attorney;

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Post Office Building,
San Francisco, California,

For Appellee.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1955

May 3—Filed complaint—issued summons.

* * *

Aug. 25—Filed amended complaint.

* * *

Oct. 5—Filed answer of defendant to complaint and amended complaint.

1956

* * *

Sept. 11—Court trial. Evidence and exhibits introduced, arguments heard, memos. ordered filed 10-5 days and case continued to Sept. 27, 1956, for submission. (Goodman)

* * *

Sept. 27—Ordered case submitted. (Goodman)

Oct. 5—Filed memo. opinion affirming judgment of Regional Commissioner. (Goodman)

Nov. 1—Entered judgment—filed Nov. 1, 1956—affirming decision of Regional Commissioner of Immig. & Natz. that plaintiff is not unable to return to country of last residence. (Goodman)

* * *

Nov. 14—Filed notice of appeal by plaintiff.

Nov. 14—Filed appeal bond in sum $250.00. (cash)

Nov. 14—Filed appellant's designation of record on appeal.

Nov. 14—Filed statement of points upon which appellant intends to rely on appeal.

United States District Court, in and for the Northern District of California, Southern Division

Civil No. 34618

CHENG LEE KING,

Plaintiff,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Defendant.

COMPLAINT

ACTION FOR DECLARATORY JUDGMENT

Comes now the plaintiff, Cheng Lee King, and for cause of action alleges, as follows:

I.

That this is an action for a Declaratory Judgment under the Declaratory Judgment Act (28 USC 2201) and for a review under the Administrative Procedure Act (5 USC 1001, et seq.).

II.

That the plaintiff is a resident of the City and County of San Francisco, State of California, and a native and citizen of China.

III.

That the defendant, David H. Carnahan, is the Regional Commissioner of the Southwest Region of the United States Immigration and Naturalization

Service and that said district includes the State of California and the City of San Francisco.

IV.

That the defendant, David H. Carnahan is charged with the duty to make a final determination on all applications filed within his district pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953.

V.

That on or about the 21st day of December, 1953, the plaintiff filed an application for adjustment of his Immigration status to that of a permanent resident to Section 6 of the Refugee Relief Act of 1953 with Bruce G. Barber, the District Director of the Immigration and Naturalization Service, San Francisco, California.

VI.

That on or about June 6, 1954, plaintiff was accorded an informal interview after which his application was denied on the alleged ground that he last entered the United States subsequent to July 1, 1953, and was, therefore, ineligible for adjustment of his immigration status to that of a permanent resident. A copy of said Order is attached hereto, marked Exhibit "A" and made a part of this Complaint.

VII.

That by order dated September 23, 1954, the Assistant Commissioner, Inspections and Examinations Divisions, Washington, D. C., reversed the pro-

posed decision and remanding the case for further proceedings. A copy of said decision is attached hereto, marked Exhibit "B" and made a part of this Complaint.

VIII.

That plaintiff was accorded a second informal interview on or about the 17th day of December, 1954, after which his application for adjustment of status was denied by order of H. H. Engelskirchen, Special Inquiry Office, San Francisco, California, which decision was affirmed by defendant on February 11, 1955. A copy of said decision is attached hereto, marked Exhibit "C" and made a part of this complaint.

IX.

That plaintiff was denied adjustment of his Immigration status by the defendant on the alleged ground that plaintiff is able to return to Singapore, the place of his last residence without persecution or fear of persecution.

X.

Prior to said hearing on or about July 13, 1954, plaintiff applied for a visa to enter Singapore from the proper British authorities; that plaintiff's, application for entry into Singapore was denied on July 17, 1954, by said British authorities.

XI.

That the only country that will accept plaintiff is China, the country of his birth and nationality.

XII.

That defendant has found that plaintiff is a person of good moral character, is anti-communist, and will be subjected to persecution or fear of persecution if returned to China, the country of his birth and nationality.

XIII.

That the decision of the defendant is a final order from which the plaintiff has no administrative appeal; that plaintiff has exhausted all administrative remedies before filing this complaint.

XIV.

That the decision of the defendant, marked Exhibit "C," is erroneous, in that, it is based on an improper interpretation or construction of Section 6 of the Refugee Relief Act of 1953.

XV.

That plaintiff is eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 as amended.

Wherefore, plaintiff requests a judgment declaring:

1. That plaintiff's application for adjustment of status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 may not be denied by the defendant on the ground that plaintiff is able to return to the place of his last residence without persecution or

fear of persecution because of race, religion or political opinion.

2. For such other and further relief as is deemed by the Court to be proper.

Dated: 5/3/55.

FALLON AND HARGREAVES,

By /s/ ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

EXHIBIT A

United States Department of Justice Immigration and Naturalization Service

File: 1300-133243-San Francisco
Serial Number: 256

In Re: Lee, Nee Yuet, aka Cheng, Lee King

Proceeding Under Section 6 of the Refugee Relief Act of 1953.

In Behalf of Applicant:
Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of Immigration status.

The applicant is forty years of age, single, male, and a native and citizen of China. He last entered the United States at Baltimore, Maryland, on Au-

gust 20, 1953, when he was admitted as a seaman under the provisions of Section 101 (a) (15) (D) of the Immigration and Nationality Act.

One of the requirements for adjustment of status under Section 6 of the Refugee Relief Act is that the entry of an applicant into the United States has to be prior to July 1, 1953. As the applicant last entered the United States subsequent to that date, his application must be denied.

Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that he last entered the United States subsquent to July 1, 1953.

/s/ L. W. MARSTON,
Immigration Officer.

EXHIBIT B

United States Department of Justice Immigration and Naturalization Service

September 23, 1954.

File: 1300-133243-San Francisco
Serial No. 256

In Re: Nee Yust Lee, aka Cheng Lee King.

Proceedings under Section 6 of the Refugee Relief Act of 1953.

In Behalf of Applicant:
Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of Immigration status.

The immigration officer has recommended that this application be denied because of the absence from the United States of the applicant after July 1, 1953. In view of the fact, however, that one of the specific requirements for eligibility under Section 6 is that the applicant be present in the United States on August 7, 1953, it is clear that the law contemplates the possibility of an absence after July 1, 1953. It is therefore concluded that the alien's temporary absence from the United States after July 1, 1953, does not preclude him from establishing eligibility under the provisions of Section 6 of the Refugee Relief Act of 1953.

Order: It is ordered that this case be remanded to the immigration officer for further proceedings consistent with the foregoing.

ASSISTANT COMMISSIONER,
Inspections and Examinations
Division.

SI/mf

EXHIBIT C

United States Department of Justice Immigration and Naturalization Service

File: 1300-133243-San Francisco
Serial Number: 256

In Re:
Lee, Nee Yuet
aka Lee, Cheng King
and Cheng, Lee King

Proceedings Under Section 6 of the Refugee Relief Act of 1953, as Amended.

In Behalf of Applicant:
Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of immigration status.

The applicant is a 41-year-old single male alien, a native and citizen of China. He last entered the United States at the port of San Francisco, California, on August 20, 1953, at which time he was admitted as an alien crewman for a period not to exceed twenty-nine days under the provisions of Section 101 (a) (15) (D) of the Immigration and Nationality Act. His application for adjustment of immigration status is apparently based upon entry at San Francisco on April 29, 1953, as a member of the crew of the S. S. "Harvard Victory," at which

time he was also admitted under the provisions of Section 101 (a) (15) (D) of the aforesaid Act. The applicant testified that he entered the United States many times as an alien seaman between 1945 and August 20, 1953, and that on the occasion of each entry it was his intention to depart from the United States pursuant to the terms of his admission in pursuit of his calling. From all of the evidence of record the conclusion is warranted that the applicant on all of the occasions of his entries to the United States was a bona fide crewman, or seaman, and was lawfully admitted to the United States as such.

The record discloses the original hearing in this case was conducted on June 16, 1954, and the examining officer who conducted that proceeding recommended the alien's application be denied on the ground that he last entered the United States subsequent to July 1, 1953. The Assistant Commissioner, Inspections and Examinations Division, Immigration and Naturalization Service, Washington, D. C., in order dated September 23, 1954, remanded this case to the field for further proceedings, stating a temporary absence from the United States subsequent to July 1, 1953, would not preclude an applicant establishing eligibility under the provisions of Section 6 of the Refugee Relief Act of 1953, as amended.

The applicant testified that he was physically present in the United States on August 7, 1953. A certification of arrival on Form I-405 attached to the record discloses that he was admitted to the

United States as an alien crewman at Honolulu, T. H., on August 7, 1953.

The record discloses the applicant was born at King Chow, Hainan Islands, China on June 2, 1913, and that he lived in China until 1924. The applicant testified his father took him to Singapore in 1924, and that he resided therein continuously until 1939. He stated during the period he lived in Singapore he worked in a coffee shop and as a houseboy. He stated his father returned to China immediately after taking him to Singapore, and that his father died in China when he was about twelve years old. The applicant testified that in 1939, he obtained employment as a seaman and that he has been following that occupation ever since. During World War II, he worked on ships sailing out of British ports to the Mediterranean area. About September, 1945, he first arrived in the United States and has sailed out of American ports ever since. He testified that he worked on Panamanian ships in 1946 and 1947 and on American ships from 1947 to 1953. He also testified that since he first entered the United States in 1945, he has always been signed on and discharged from the various ships upon which he worked in American ports. He further testified that he has not been in China at any time since 1924 and that he has not returned to Singapore since 1939. He stated he has not established a residence in any foreign country since 1939. Upon the basis of the foregoing, it is concluded that China is the country of the ap-

[Title of District Court and Cause.]

AMENDED COMPLAINT
Action for Declaratory Judgment
(As of Course)

Comes now the plaintiff, Cheng Lee King, and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows, to wit:

I.

By adding to the end of paragraph XIV, on page 3, the following:

That plaintiff lawfully entered the United States as a bona fide non-immigrant prior to July 1, 1953, to wit: April 29, 1953; that plaintiff was physically present in the United States on August 7, 1953, to wit: Honolulu, T. H.; that plaintiff is unable to return to the country of his birth or nationality because of persecution or fear of persecution on account of political opinion; that plaintiff is and at all times has been a person of good moral character; that plaintiff is otherwise qualified for admission to the United States under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed.

II.

By amending paragarph XV to read as follows, to wit:

That plaintiff is statutorily eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953, as amended.

FALLON AND HARGREAVES,

By /s/ A. W. HARGREAVES,
Attorneys for Plaintiff.

[Endorsed]: Filed August 25, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND AMENDED COMPLAINT

Comes now David H. Carnahan, as Regional Commissioner of the Immigration and Naturalization Service, defendant in the above-entitled action, and in answer to plaintiff's complaint and amended complaint admits, deines and alleges as follows:

I.

Admits the allegations contained in paragraphs I through VIII of the complaint.

II.

Denies the allegation of paragraph IX and alleges that the reason for denying plaintiff's application for adjustment of his immigration status is fully set forth in the special inquiry officer's recommendation on page 2 of Exhibit "C" of the complaint.

III.

Answering paragarph X, defendant admits that on or about July 13, 1954, plaintiff applied to the British Consulate General in San Francisco for a visa to enter Singapore, but denies the other allegation contained in said paragraph X.

IV.

Answering paragraph XI of the complaint, defendant has no knowledge, information or belief as to the allegations, therein therefore denies the same.

V.

Answering paragraph XII, the defendant alleges that no finding was made as to the good moral character or as to the Communist affiliations or affections of the plaintiff, but on the assumption of the truth of plaintiff's claims the special inquiry officer found that "the applicant was unable to return to China, the country of his birth and nationality, within the meaning of Section 6 of Refugee Relief Act of 1953, as amended" was warranted.

VI.

Defendant admits the allegations contained in paragraph XIII of the complaint.

VII.

Answering paragraph XIV of the complaint as amended, defendant admits that the plaintiff was in Honolulu, T. H., on August 7, 1953; denies that the decision of defendant finding plaintiff ineligible

for relief pursuant to Section 6 of the Refugee Relief Act of 1953, as amended (1971 (d) T. 50 USC) is erroneous; has no knowledge, information or belief as to the other allegations contained in said paragraph XIV and therefore denies the same.

VIII.

Answering paragraph XV of the complaint as amended, defendant denies the allegations contained therein.

Wherefore, Defendant prays that the relief sought by plaintiff be denied; that the complaint and cause of action stated therein be dismissed, and that defendant recover his proper costs therein.

LLOYD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States
Attorney.

Affidavit of Mail attached.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

OPINION AND ORDER FOR JUDGMENT

Goodman, District Judge.

Plaintiff seeks review of an order of the Regional Commissioner of the Immigration and Naturaliza-

tion Service issued February 11, 1955, denying his application pursuant to Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 USC Appendix §1971d), for adjustment of his non-immigrant status to that of an alien lawfully admitted for permanent residence.

Section 6 of the Refugee Relief Act provides that any non-immigrant alien within the United States who is found by the Attorney General to meet certain specified requirements may have his case presented to the Congress for it to decide whether he shall be granted permanent residence. By regulation, 8 C. F. R. §§481.1-481.11, the Regional Commissioners of the Immigration and Naturalization Service have been designated as the delegates of the Attorney General to determine whether an applicant meets the requirements specified in Section 6 for referral to Congress.

One of these requirements is that the alien be "unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion." It is not disputed that fear of persecution bars plaintiff's return to China, the country of both his birth and nationality. However, the country where plaintiff last resided was Singapore where he lived for some fifteen years. The Regional Commissioner denied plaintiff's application for adjustment of status on the ground that his inability to return to Singapore is not on account of persecution or fear of persecution.

Plaintiff concedes that the reason he cannot return to Singapore is not because of fear of persecution but because he is unable to obtain a visa. He contends, however, that the requirements of Section 6 are satisfied if an applicant is unable to return to one of the alternate countries because of fear of persecution, or at all events, if he is unable to return to any of the three alternate countries and his inability to return to one of them is because of fear of persecution.

Although Section 6 refers to the countries of birth, nationality, or last residence in the alternative it is clear that the Congress intended that, if these countries are different, applicants must be unable to return to any of the three. In 1954, a revision of the language "birth, or nationality, or last residence" was proposed in House Bill 18193, 83rd Congress, 2d Session. The Report of the Senate Judiciary Committee on House Bill 8193 (Senate Report 2045) states that "The committee has restored the language 'birth, or nationality, or last residence,' which is the language presently contained in section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization to mean that if the applicant for adjustment is able to return to any such country without persecution or fear of persecution, he is not eligible for adjustment. Since, the existing language, as construed, correctly expresses the intent of the section no pur-

pose would be served by modifying the language as proposed in the bill."

Section 6 quite plainly states that the inability to return to the specified countries must be because of persecution or fear of persecution. There is nothing in the legislative history of Section 6 to suggest that the Congress intended that an alien who could not return to one of the specified countries because of fear of persecution would be eligible for relief under Section 6, if, for different reasons, his return to the alternate countries was also barred.

Plaintiff urges that the Refugee Relief Act is remedial legislation and as such should be liberally construed. It is true that the Refugee Relief Act may be characterized as remedial legislation, but it is also apparent that it was not designed to afford relief to all deserving refugee aliens within the United States. The number of aliens who may be granted permanent residence under the Act is limited to 5,000 regardless of the number of eligible applicants. The construction of Section 6 urged by plaintiff would necessarily increase the number of eligible applicants. It would add to the burden of the Congress in selecting from the eligible applicants those to be granted permanent residence. These considerations militate against giving Section 6 any broader construction than the language, itself warrants.

The decision of the Regional Commissioner is correct and is affirmed.

Present judgment accordingly.

Dated: October 5, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed October 5, 1956.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 34618

CHENG LEE KING,

Plaintiff,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Defendant.

JUDGMENT

Plaintiff's Complaint for Declaratory Judgment and for review of the Order of the Regional Commissioner of the Immigration and Naturalization Service issued February 11, 1955, having come on for hearing, and Fallon and Hargreaves appearing for the plaintiff, Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, appearing for the defendant, and the Court having heretofore filed its Opinion and Order for Judgment, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Regional Commissioner is correct and is affirmed and the adjustment of status sought by plaintiff under Section 6 of the Refugee Relief Act of 1953 was properly denied in that plaintiff is not unable to return to the country of his last residence because of persecution or fear of persecution on account of race, religion or political opinion.

So Ordered.

Dated: November 1st, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed and entered November 1, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

You are hereby notified that the plaintiff, Cheng Lee King, appeals to the United States Court of Appeals for the Ninth Circuit, from the Final Judgment entered in the above action on November 1, 1956.

Dated: December 13, 1956.

FALLON AND HARGREAVES,
By /s/ ARLIN W. HARGREAVES,
Attorneys for Appellent.

[Endorsed]: Filed December 14, 1956.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND FOR COSTS ON APPEAL

The undersigned jointly and severally acknowledges that he and his personal representatives are bound to pay to defendant, the sum of Two Hundred Fifty ($250.00) Dollars, and he hereby deposits in cash the sum of Two Hundred Fifty ($250.00) Dollars into the registry of this Court in lieu of a bond for costs on appeal.

The condition upon which said deposit is made is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed December 14, 1956, from the Judgment of this Court entered November 1, 1956, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, then said deposit shall be returned to the undersigned, but if the plaintiff fails to perform this condition, delivery of said deposit to the defendant shall be made forthwith.

/s/ CHENG LEE KING,
Plaintiff.

Signed and acknowledged before me this 14th day of December, 1956.

[Seal] /s/ J. ELEANOR JONES,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires November 1, 1959.

[Endorsed]: Filed December 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.
Complaint.
Amended Complaint.
Answer to Complaint and Amended Complaint.
Opinion and Order for Judgment.
Judgment.
Notice of Appeal.
Appeal Bond.
Statement of Points Upon Which Appellant Intends to Rely.
Appellant's Designation of Record on Appeal.
Plaintiff's Exhibit 1.
Defendant's Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of January, 1957.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15415. United States Court of Appeals for the Ninth Circuit. Cheng Lee King, Appellant, vs. David H. Carnahan, as Regional Commissioner of the Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 16, 1957.

Docketed: January 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15415

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

STATEMENT OF POINTS

The points upon which Appellant will rely on appeal are:

1. The Trial Court erred in its construction of Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 U.S.C. Appendix 1971d), by deciding that plaintiff is ineligible for adjustment of status under that Act because his inability to return to Singapore, the country of his last residence, is based upon the impossibility of procuring the requisite documents to enter Singapore, rather than upon persecution or fear of persecution in that country.

Dated: January 18, 1957.

FALLON AND HARGREAVES,

By /s/ ARLIN W. HARGREAVES,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 21, 1957.